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Supreme Court of the United States

OCTOBER TERM, 1940.

No. 1025

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, PETITIONER,

VS.

MELVERN A. COOPER, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

CYRUS CRANE,
GEO. J. MERSEREAU,
JOHN N. MONTEITH,
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Counsel for Petitioner.

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Supreme Court of the United States

OCTOBER TERM, 1940.

No. .....

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, PETITIONER,

VS.

MELVERN A. COOPER, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, The Atchison, Topeka and Santa Fe Railway Company, respectfully prays that a writ of certiorari be issued to the Supreme Court of Missouri to review a judgment of that court entered February 1, 1941 (148 S. W. 2d 773),* affirming a judgment of the Circuit Court of Jackson County, Missouri, at Independence. A certified transcript of the record in this case, including the proceedings in the Missouri Supreme Court, is furnished herewith in accordance with Rule 38 of the Rules of this Court.

*Motion for rehearing denied March 12, 1941.

STATEMENT OF THE MATTER INVOLVED.

The question involved is whether the Federal Employers' Liability Act (April 22, 1908, Ch. 149, Sec. 1, 35 Stat. 65; 45 U. S. C., Sec. 51) applies in this case to govern the rights of petitioner and Cooper. The Act's applicability depends upon the character of Cooper's employment at the time he was injured—whether he was at that time engaged in interstate transportation or in work so closely related thereto as to be practically a part of it. Petitioner was admittedly so engaged.

Cooper was employed by petitioner as a switchman in its switch yard at Topeka, Kansas (R. 20). He was injured there on November 25, 1936 (R. 37), allegedly as the result of petitioner's negligence. He filed an action to recover damages for such injuries on February 3, 1937, in the Circuit Court of Jackson County, Missouri, at Independence (R. 1). The case was tried before the court and a jury from April 25 to April 29, 1938, and the jury returned a verdict for $25,000 for Cooper (R. 12). At the close of the evidence, the trial court refused to declare as a matter of law that Cooper was engaged in interstate transportation within the Federal Act (R. 621), and submitted the case to the jury under Kansas law, which abrogated and barred the defenses of the employee's assumption of the risk and contributory negligence, defenses permitted by Sections 3 and 4 of the Federal Act. The Supreme Court of Missouri affirmed the judgment (R. 674), holding (R. 683) that the Act did not apply because Cooper was not engaged in interstate transportation, and, therefore, the trial court's submission was correct.

STATEMENT OF THE BASIS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

a. Statutory provision believed to sustain jurisdiction.

The jurisdiction of this Court is invoked under Section 237(b) of the Judicial Code as amended by the Act of February 13, 1925, Ch. 229, Sec. 1, 43 Stat. 937 (28 U. S. C., Sec. 344(b)) and under the same Act, Ch. 229, Sec. 8, 43 Stat. 940 (28 U. S. C., Sec. 350).

b. Statute of the United States involved.

The statute of the United States involved, under which petitioner claims rights denied it by the Missouri Supreme Court, is the Federal Employers' Liability Act (Act of April 22, 1908, Ch. 149, Sec. 1 *et seq.*, 35 Stat. 65 (45 U. S. C., Sec. 51)). Section 1 provides that every common carrier by railroad while engaging in interstate commerce shall be liable in damages to any person suffering injury "while he is employed by such carrier in such commerce" for such injury resulting in whole or in part from the carrier's negligence or from any defect or insufficiency due to its negligence, in its cars, etc., track, roadbed or other equipment. Section 3 abolishes the employee's contributory negligence as a defense to liability but provides that the damages shall be diminished by the jury in proportion to the amount of negligence attributable to the employee. Section 4 abolishes the defense of the employee's assumption of the risks of his employment in any case where the violation by the carrier of any statute enacted for the safety of employees contributed to the injury. No such statute is involved here.

c. Date of the judgment sought to be reviewed.

The judgment of the Supreme Court of Missouri affirming the judgment of the Circuit Court of Jackson County, Missouri, was rendered February 1, 1941 (R. 674). Petitioner's motion for a rehearing was denied on March 12, 1941 (R. 711). This petition for writ of certiorari and the supporting certified transcript of the record were filed in this court within three months from March 12, 1941.

d. Grounds believed to sustain jurisdiction.

If the employee was at the time of his injury engaged in interstate commerce as that term in Section 1 of the Federal Employers' Liability Act is defined by the cases, the Act applies in this case to govern exclusively the rights of the parties without regard to state law. *Chesapeake & Ohio Ry. Co.* v. *Stapleton*, 279 U. S. 587; *Chicago, M. & St. P. Ry. Co.* v. *Coogan*, 271 U. S. 472. The Supreme Court of Missouri has held that the Act does not apply, and, therefore, applying Kansas law, has denied to petitioner the defenses of Cooper's assumption of risk and contributory negligence, permissible defenses under the Federal Act. Petitioner has thus been deprived of rights claimed under the Act. The federal question involved is therefore substantial and should be reviewed by this Court. The cases sustaining this Court's jurisdiction are:

St. Louis, I. M. & S. Ry. v. *Taylor*, 210 U. S. 281.

St. Louis, S. F. & T. Ry. Co. v. *Seale*, 229 U. S. 156.

North Carolina R. R. Co. v. *Zachary*, 232 U. S. 248.

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Chicago, R. I. & P. Ry. Co. v. *Wright*, 239 U. S. 548.

Philadelphia & Reading Ry. Co. v. *Hancock*, 253 U. S. 284.

Cooper alleges in his amended petition (R. 3) that he was engaged in intrastate or interstate transportation at the time he was injured, he being unable to state which alternative was true, and that (R. 4) if he were not engaged in interstate transportation, Kansas law applied to preclude the assertion by petitioner, who had rejected the Kansas Workmen's Compensation Act, of the defenses of assumption of risk and contributory negligence. Petitioner pleaded in its amended answer (R. 10) that Cooper was engaged in interstate transportation within the meaning of the Federal Act and that it therefore applied, and that Cooper had assumed the risk of his injury and was guilty of contributory negligence. At the close of all the evidence, petitioner requested, and the trial court refused (R. 616), a peremptory instruction in the nature of a demurrer to all the evidence. Petitioner also requested the court, and the court refused (R. 616), to declare as a matter of law that Cooper was engaged in interstate transportation at the time of his injury and that, therefore, the rights of the parties were governed by the Federal Act. Petitioner also requested the court, and the court refused (R. 627-9), to submit to the jury under appropriate instructions the questions of Cooper's assumption of the risk and contributory negligence. Petitioner properly excepted to these rulings (R. 616, 617, 629). The trial court, over petitioner's objection (R. 625), instructed the jury (R. 621) that these defenses were not available. The case was submitted under Kansas law on Instruction "2" (R. 621), requested by Cooper. The only question on which the jury had to pass was petitioner's common law negligence, if any, in constructing and maintaining tracks 9 and 10 in such close proximity to each other as to be dangerous and unsafe for Cooper to ride on cars on track 10 when there were cars on track 9, and in placing cars on track 9 knowing of the danger, and in failing to warn Cooper of the presence of cars on track 9.

If Cooper were not engaged in interstate transportation, the trial court's submission of the case to the jury

was correct, since petitioner had elected not to come under the Kansas Workmen's Compensation Act (R. 20) and by Section 52 of that Act (Sec. 44-544, Gen. Stat. of Kan., 1935) the defenses of assumption of risk and contributory negligence are abrogated and barred in all actions for personal injuries by employees where the employer has rejected the Act. On the other hand, if Cooper were so engaged, the Federal Act applies and these defenses could be invoked.

After the verdict and judgment, petitioner filed a motion for a new trial (R. 660) attacking the trial court's rulings on the instructions (R. 662-3). This motion was overruled (R. 669). Petitioner appealed to the Supreme Court of Missouri (R. 671, I) and assigned as error in that court the rulings of the trial court on the applicability of the Federal Act. These assignments were:

I.

> The trial court erred in refusing defendant's requested peremptory Instruction "B" in the nature of a demurrer to all the evidence, since the evidence shows, as a matter of law (1) that plaintiff was at the time of his injury engaged in interstate transportation so that the Federal Employers' Liability Act applies and (2) that plaintiff assumed the risk of his injury, and (3) that even under common law there was no evidence of any negligence on defendant's part.

II.

> The trial court erred in refusing defendant's Instructions "I," "J," and "K," requesting the submission of the questions of assumption of risk and contributory negligence to the jury, and in giving, over defendant's objection, plaintiff's Instruction "1," withdrawing these questions from the jury since there was substantial evidence of both defenses.

The Missouri Supreme Court affirmed the judgment (R. 674) holding (R. 683) that there was "no evidence re-

quiring the conclusion" that Cooper was engaged in interstate transportation, within the meaning of the Federal Act, at the time of his injury so that the Act did not apply, and, therefore, under Kansas law, the trial court correctly instructed the jury.

THE QUESTIONS PRESENTED.

1. The evidence shows that, as a matter of law, Cooper was at the time of his injury engaged in interstate transportation or work so closely related thereto as to be practically a part of it so that the Federal Employers' Liability Act applies to govern the rights of the parties.

2. If the Federal Act applies, the evidence shows that, as a matter of law, Cooper assumed the risk of his injury.

3. If the Federal Act applies and if the evidence does not show Cooper's assumption of risk as a matter of law, there is substantial evidence of Cooper's assumption of the risk and contributory negligence so that these questions should have been submitted to the jury.

THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. The Supreme Court of Missouri has held that Cooper was not, at the time of his injury, engaged in interstate transportation within the meaning of the Federal Employers' Liability Act and in so holding, has decided an important question of federal law in conflict with applicable decisions of this Court and of the federal Circuit Courts of Appeals, and has so far failed to give proper effect to the undisputed testimony in the case establishing the interstate character of Cooper's work at the time of his injury as to call for the exercise of this Court's power of supervision.

The evidence shows that Cooper was the "fieldman" in a switch crew engaged in switching operations in the south end of the Topeka yard (R. 28). His crew began work at 4:00 P. M. and his duties were to line switches ahead of cuts when cars were being "kicked," ride and brake cars going too fast and, in general, work ahead of and away from the engine (R. 260). There were ten tracks in the yard, running north and south and numbered from east to west from one to ten. Fourth Street intersected the yard on the north about 200 or 300 feet south of the north end of the tracks. Seventh Street marked the south end of the yard (R. 258-9). A cut-off track ran from the south end of the yard north and west to a scale track and the water crane at the depot and intersected the main line. Off this cut-off track track 8 ran north. Off track 8 track 9 ran to the north. West of the point where track 8 ran off the cut-off track and track 9 ran off track 8, track 10 ran north off the cut-off track. A spur track also ran west and north off the cut-off track. Tracks 9 and 10 ran through the yard to connect with the north lead track (R. 23-4, 274). Plaintiff's Exhibit 2 (R. 22) shows the yard with these tracks. The picture was taken with the camera pointed north. While tracks 9 and 10 paralleled each other running north and south, they were not a uniform distance apart, the distance between the east rail of track 10 and the west rail of track 9 varying from 7.05 feet to 30 feet (R. 25, 555-6).

Cooper's crew had supper that night about 8:20 or 8:30 p. m. Just before supper they "shoved" cars on track 9. A cut of four cars was pushed north on 9 over the Fourth Street crossing. The crossing was then cleared and the engine backed south with the remaining cars, leaving them on 9 south of Fourth Street. Cooper remained at the Fourth Street crossing (480 feet north of the point where track 9 joined track 8), setting brakes (R. 25-7, 332, 334, 371). Track 9 south of Fourth Street had been shoved full of cars just clear of track 8; it would hold fourteen or fifteen cars (R. 333, 371, 394).

Cooper knew that track 9 had been shoved but he did not know how many cars were spotted south of Fourth Street (R. 26, 73-7, 372). After the crew shoved track 9, the engine backed south off of 9, switched over east to a clear track, and came north to Fourth Street, where the crew spent the next twenty minutes eating supper (R. 26-7, 332, 371).

The evidence relating to the nature of Cooper's duties is undisputed. About 7:00 P. M., Vandeventer, the engine foreman, received from the yardmaster the "yard checks." These are instructions to the foreman showing the switching his crew has to do (R. 261, 263, 266, 335). On one, the "west" or "straight west" check, appeared car AT-173233, a Caswell coal car loaded with sand, and car AT-99923, a tank car containing water (R. 268; Def. Ex. B, R. 353-4). The check showed that the destination of the former was Emporia, Kansas, and the latter Quenemo, Kansas (R. 271, 356). The figure "564," the Emporia station number, was also marked in chalk on the side of the sand car (R. 98, 115). The appearance of these cars on the "west" check meant two things: (1) that they were to be transported west to their destination either on train No. 29, running from St. Joseph, Missouri, to Emporia, Kansas, and due in Topeka at 9:05 P. M., or on train No. 91 running from Argentine, Kansas, to Emporia, Kansas, and due in Topeka at 2:25 A. M. (R. 264-5, 271-2, 300, 304, 350, 490, 496, 551-2), and (2) that they had been billed and assigned for such transportation on one of the two trains (R. 261, 266, 296, 335, 356). The testimony establishing these facts is so important that we quote some of it (all italics are ours). Robinson, petitioner's general yardmaster at Topeka, testified:

> Q. * * * What is to be done with cars appearing on that * * * west check?
>
> A. They are to be handled west in any train that will permit, by tonnage, of number of cars. * * * they will be handled in a later train than 29, unless the tonnage limit of 29 or the car limit of 29 will allow

us to place them in 29. If it will, why we fill 29 with cars from the west check and then run the rest of them on 91 in the morning.

Q. The west check then * * * designates cars going west, which may go either in 29 or 91?

A. That is right (R. 264).

Q. What are the duties of the other man?

A. The foreman is completely in charge of the whole crew, the engine crew and the two helpers.

Q. He is called the switch foreman?

A. He is called an engine foreman. * * *

Q. Now, who gives him his instructions when he goes to work?

A. The yard master. * * *

Q. And just tell us in what form those instructions take, how does he know what to do with his crew when he goes to work?

A. When he goes to work, or sometime after he goes to work, providing the lists are out, he will be handed a sheaf of lists * * * we call the yard checks, and on those yard checks are numbers, initials, destination of cars *that are billed and ready to move* (R. 261).

Q. * * * And that switch list is given * * * by the yardmaster or night yardmaster to the switch foreman, and that contains his work for that particular trick?

A. *Yes, that contains the information for making up the train.*

Q. Making up the trains?

A. Yes, for his particular trick (R. 266).

Q. * * * are these sheets all handed to the switch foreman at the same time (referring to defendant's Exhibit B)?

A. Yes, sir, he gets a complete set of the yard check so he knows where all cars are *billed and going.*

Q. And he gets that when he goes to work at 4:00 o'clock?

A. No, he gets it at 7:00 o'clock.

Q. Seven o'clock in the evening?

A. Seven o'clock in the evening. That is after all billing is in, as the 4:00 o'clock yard check wouldn't

do much good, because there is a lot of billing after that (R. 296).

Vandeventer, the engine foreman, testified to the same effect:

Q. Did you already have your yard check at the time you went to lunch that night?

A. Yes.

Q. The seven o'clock check?

A. Yes.

Q. I hand you some papers here marked defendant's Exhibit B, consisting of seven sheets, and ask you * * *—it is dated 11/25/36—if you can tell us what that is? * * *

A. Well, these are the yard checks that I get at 7:00 o'clock. * * * This shows me * * * *what cars that I have in the yards to go out.*

Q. In other words, this just lines up your work?

A. Lines me out on my work. * * *

Q. And you get this from the yardmaster's office?

A. Yes. * * *

Q. And from this you do the work that the crew is to do that night?

A. Yes. * * * (R. 335).

Q. * * * You know whether this car was billed or not?

A. *Well, it's billed or it wouldn't be on the checks.* * * *

Q. Billed to Emporia, Kansas?

A. I wouldn't say that, it was billed to 564, that is all I have any information on.

Q. Well, 564 is Emporia, Kansas?

A. Yes (R. 356).

Both cars originated in Topeka (R. 300) and were resting on track 10 about 500 feet north of the point where track 10 ran off the cutoff track (R. 29, 337). Before being put into either train, the load of sand had to be weighed on the scales located just north of Fourth Street, just off the cutoff track, to determine whether or not

the load exceeded the tonnage of the car (R. 110, 303, 355, Def. Ex. B, R. 354). It had been weighed the night before, found to be overloaded, and its contents reduced, presumably to its correct weight (R. 351, 355).

After supper, Vandeventer decided, and so told his crew, including Cooper, that the crew and engine would go in track 10, hook onto the sand car, weigh it, and "put it on train 29" (R. 121, 336, 338, 341, 347, 357). To execute this intended operation, the engine backed south from Fourth Street on a clear track, switched over to and proceeded north on track 10, hooked onto the tank car (the south car) to which was attached the sand car, and started backing south out of track 10 with these two cars (R. 28-9, 31, 119, 337-9). In the meantime Cooper, who, after supper, had resumed setting brakes just south of the Fourth Street crossing (R. 28), came across to catch the drag (R. 29, 339), since he was required to assist in the proposed switching operation (R. 479, 494). He cut through the drag of cars on track 9 about half way between Fourth Street and the point where 9 joined track 8, boarded the east side of the north end of the sand car moving south on track 10, standing on the stirrup and hanging onto the grab-iron, and travelled 300 to 350 feet in this position, looking at and talking to Vandeventer, who was standing on the rear (north) end of the sand car, releasing the brake (R. 29-32, 33, 80, 97, 108, 119, 339, 371). Something then hit Cooper in the side of the head, knocking him from the sand car and causing him to fall to the track (R. 31, 37), as the result of which he claims to have been injured.

The evidence tends to show that Cooper was struck and knocked off of the sand car by the overhang of another car, a refrigerator car, resting on track 9, parallel to track 10 at the place of Cooper's injury, the narrowest place between the two tracks (R. 31-2, 37, 48, 107, 347, 367; Plf. Ex. 2, R. 22). At that point, the distance between the center of the east rail of track 10 and the center of the west rail of track 9 was 7.05 feet. The overhang of

the sand car, including the grab irons, from the center of the east rail was 2 feet, 9.25 inches; the overhang of the refrigerator car, including the grab irons, from the center of the west rail was 2 feet, 7 inches. The clearance between these cars when opposite each other at the narrowest place was 1 foot, 7-3/4 inches (R. 85, 560).

The purpose of the intended movement was to move the sand car to make it a part of train No. 29. First it had to be weighed. The intended movement involved dragging the two cars out of track 10, "kicking" the sand car up the cut-off track, "kicking" the tank car back in 10, hooking onto the sand car and pushing it up the cut-off track to the scales (R. 110, 112, 359). After being weighed, it was to be switched back on the cut-off track (R. 112) and over to another track to be made a part of No. 29. Customarily No. 29 was made up on track 2. All cars to be transported on No. 29, intrastate or interstate, were switched and placed on track 2. No. 29 arrived in Topeka on another track. Upon its arrival, all cars from it destined for points west of Topeka were switched and attached to the cars already on track 2 and No. 29's engine would then hook onto the train thus made up and take it west. Cooper's crew had to do this switching or "classification" work (R. 358, 369, 381-2, 479, 490, 494). When the switching of this sand car began, the "city drag," *i. e.*, the other cars to be transported on No. 29, had not come down from the freight house. When ready, they were to be switched on track 2 and made a part of No. 29 (R. 357-8, 369, 381-2, 490), and, in fact, were so put into 29 and left Topeka that night (R. 354, 499, 500).

Because the sand car had to be inspected after the accident as a matter of routine, it was not then weighed or switched but was left on track 7 (R. 377-8, 477-8). Later that night it was switched and put into No. 91, which left Topeka at 3:30 A. M., and carried, in addition to the sand car, an empty boxcar for Pueblo, Colorado, a

company material car for Albuquerque, New Mexico, and a company material car for Cleburne, Texas (R. 478, 481, 487-9, 555-6). When No. 91 arrived in Topeka from Argentine, Kansas, at 2:25 A. M., it carried two cars of boxes and a car of merchandise destined for St. Joseph, Missouri (R. 553-4).

The tank car was left at Topeka on No. 29, which carried, in addition, a car of machinery for Sweetwater, Texas, an empty tank car for Cleburne, Texas, and a car of household goods for Los Angeles, California (R. 477, 480, 500-2).

Upon this evidence, the Missouri Supreme Court held (R. 682-3) that there was "no evidence" that Cooper was engaged in interstate transportation, within the meaning of the Federal Act, at the time of his injury, because (a) the sand car had not been definitely assigned in interstate transportation, (b) whatever assignment or designation there was, it was, at best, merely tentative or contingent, and (c) the fact that the sand car ultimately left on No. 91, which carried three interstate cars picked up at Topeka, was immaterial because there is no evidence that these cars had been switched at the time of Cooper's injury. Petitioner contends that applicable decisions of this Court and of the Circuit Courts of Appeals require the conclusion that the evidence in this case shows as a matter of law that Cooper was, when injured, engaged in interstate commerce within the Act, because he was engaged in switching a car to be made part of an interstate train.

Shanks v. *Delaware, L. & W. R. R. Co.*, 239 U. S. 556.

Jacobs v. *Southern Ry. Co.*, 241 U. S. 229.

Norfolk & Western Ry. Co. v. *Earnest*, 229 U. S. 114.

St. Louis, S. F. & T. Ry. Co. v. *Seale*, 229 U. S. 156.

Philadelphia & Reading Ry. Co. v. *Hancock*, 253 U. S. 284.

North Carolina R. R. Co. v. *Zachary*, 232 U. S. 248.

New York Central & H. R. R. Co. v. *Carr*, 238 U. S. 260.

Pennsylvania R. Co. v. *Donat*, 239 U. S. 50.

Louisville & Nashville R. R. Co. v. *Parker*, 242 U. S. 13.

Southern Ry. Co. v. *Puckett*, 244 U. S. 571.

Seaboard Air Line Ry. v. *Koennecke*, 239 U. S. 352.

Pennsylvania R. Co. v. *Morrison*, 6 Cir., 3 F. 2d 986.

Baltimore & O. R. Co. v. *Darling*, 6 Cir., 3 F. 2d 987.

Pennsylvania R. Co. v. *Logansport Loan & Trust Co.*, 7 Cir., 29 F. 2d 1.

Wheeling Terminal Ry. Co. v. *Russell*, 4 Cir., 209 Fed. 795.

2. The Supreme Court of Missouri has held that the Federal Employers' Liability Act does not apply and that therefore the defenses of the employee's assumption of the risk and contributory negligence are barred to petitioner by Kansas law. If the Federal Act does apply, the Supreme Court of Missouri has, in denying to petitioner the right to assert these defenses, decided an important question of federal law in conflict with applicable decisions of this Court and of the federal Circuit Courts of Appeals and has so far ignored Sections 3 and 4 of the Federal Act as to call for the exercise of this Court's power of supervision.

Great Northern Ry. Co. v. *Leonidas*, 305 U. S. 1.

The evidence relating to Cooper's assumption of the risk and contributory negligence is undisputed. Track clearances in the Topeka yard, including the close clearance between tracks 9 and 10 at the narrowest place, had been the same since and prior to 1922 (R. 282, 478). There were other places in the yard where there was close clearance between tracks or between tracks and obstructions (R. 293, 386). Cooper was an experienced

switchman (R. 17, 57-9, 61-2), and had worked for petitioner in its Topeka yard in 1920 and in 1929 and from 1930 to 1934 and from April, 1936, until his injury on November 25, 1936 (R. 17-18, 59-64, 116, 281). He worked in and over the whole yard and was familiar with the number and outlay of all the tracks, particularly those in that part of the yard south of Fourth Street (R. 64-5). He knew that track clearance was not uniform and knew of places where clearance was close (R. 66-7). So did other employees (R. 491). He knew that the space between tracks 9 and 10 was not uniform but varied as the tracks ran north (R. 25). He knew that he had to look out for ordinary hazards and that his job was not a "safe" one (R. 69, 117). In his application for employment (R. 72), he stated that he understood that at some points on the line, there were platforms, sheds, roofs, etc., cars and other side obstructions which might be dangerous and that he must inform himself of the location of such obstructions and use due care to avoid injury thereby.

His crew "put cars in track 9 every shift." He had been on track 10 "numerous times" and knew that cars were likely to be on track 9 (R. 94-5). When the cars were shoved on track 9 just before supper, he was at the Fourth Street crossing and actually cut a drag of four cars north of the crossing. He knew that track 9 had been shoved and knew there were cars on it south of a point half way between Fourth Street and the junction of tracks 8 and 9, although he said he did not know exactly how many were there (R. 26, 74-8, 372). He also said he had never ridden cars out of track 10 when there were other cars on track 9 at the narrowest place between the two tracks (R. 38). After supper, he resumed setting brakes on cars just south of Fourth Street and knew that the engine and crew were going to switch the sand car to the scales and then into No. 29 (R. 28, 121, 340). He saw the engine go south from the crossing, switch over to track 10 and hook onto the two cars (R. 28-9). He

then started across and through the cut of cars on 9 to catch the drag on 10 (R. 29, 339). He came through about half way between Fourth Street and the point where 9 ran off 8 (R. 80). He knew that cars were south of him on 9 (R. 78-81). Approaching the sand car (the north car) "from the direction of the engine" (south) (R. 339), he boarded the north end on the east side as it moved along, standing in the stirrup and hanging onto the grab-irons (R. 30, 97, 119, 339). In such position, he saw and talked to Vandeventer, who was standing 3 or 4 feet away on the brake or north end of the car, releasing the brake (R. 29, 31, 33, 338, 340-1). Vandeventer told him that they were taking the sand car to the scales to be weighed and then to make train 29 (R. 121, 341). He was looking up to and at Vandeventer (R. 33, 371). He saw Vandeventer's lips moving and saw the number "564" written in chalk on the side of the sand car (R. 33, 98, 115, 123). The switch engine was only two car-lengths south of him, its headlight on, facing north (R. 78, 95). He had a lantern on his left arm (R. 30). He rode in this position 300 to 350 feet before something hit him in the side of the head, knocking him off (R. 32, 37, 108). He could have ridden the north end of the car instead of the side and avoided all danger of injury (R. 148, 291). Vandeventer and Lawhun, the "pin puller," who was riding the top of the tank car (R. 398), both testified that they knew that cars were on track 9 at that place and that if they had looked they could have seen them (R. 343, 383, 400).

If the Federal Act applies, petitioner contends that this evidence shows as a matter of law that Cooper assumed the risk of his injury, or that, in any event, it is substantial enough to require the submission of the questions of assumption of risk and contributory negligence to the jury.

Randall v. *Baltimore & O. R. R. Co.*, 109 U. S. 478.

Tuttle v. *Detroit, G. H. & M. Ry.*, 122 U. S. 189.

Toledo, St. L. & W. R. Co. v. *Allen*, 276 U. S. 165.
Texas & Pacific Ry v. *Swearingen*, 196 U. S. 51.
Gilbert v. *Burlington, C. R. & N. Ry.*, 8 Cir., 128 Fed. 529.

Because the Missouri Supreme Court held that the Act did not apply, it refused to consider the effect of this evidence (R. 683).

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Supreme Court of Missouri, commanding said court to certify and send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the record and of all the proceedings of the said Supreme Court of Missouri in the case entitled, "*Melvern A. Cooper, Respondent,* v. *Atchison, Topeka and Santa Fe Railway Company, Appellant,* No. 36318," and that the judgment herein of the Supreme Court of Missouri be reversed by this Court and that your petitioner have such other and further relief in the premises as this Honorable Court may deem appropriate and proper.

The Atchison, Topeka and Santa Railway Company,
Petitioner,

By CYRUS CRANE,
GEORGE J. MERSEREAU,
JOHN N. MONTEITH,
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